NEW CHEW

v.

K.B.C. SAWMILL SDN. BHD. & ANOR.

HIGH COURT SABAH & SARAWAK, MIRI
RICHARD MALANJUM JC
[SUIT NO. MR. 23 OF 1983]
18 AUGUST 1992

CIVIL PROCEDURE: *Appeal - Leave to appeal to Supreme Court pursuant to s. 68(2) CJA 1964 - Application made after expiry of one month from date of judgment - Whether any time limit for application for leave to appeal under s. 68(2) Courts of Judicature Act 1964 - Rules 56, 60 RSC 1980.*

On 20 October 1990 the High Court delivered a judgment in favour of the plaintiff. On 10 November 1990 defendants filed a notice of appeal without due compliance with s. 68(2) Courts of Judicature Act 1964 (CJA) to the Supreme Court. On 11 July 1991 defendants filed a notice of motion to the Supreme Court for leave to appeal and extension of time to file the memorandum and record of appeal.

On 9 November 1991 plaintiff filed a notice of motion to the Supreme Court applying *inter alia* for an order that the appeal of the defendants be struck out. On the day when both the notices came up for hearing before the Supreme Court, the defendants withdrew their application with liberty to file an application for leave to appeal in the High Court and the plaintiff's application was adjourned. Hence the present application by the defendants via a summons in chambers dated 24 December 1991 applying for leave to appeal to Supreme Court pursuant to s. 68(2) CJA.

Plaintiff objected to the application on the ground that the application would be incompetent since the time for appealing had expired. Plaintiff submitted that under r. 56 of the Rules of the Supreme Court 1980 (RSC) the time limit to appeal to the Supreme Court was one month. Plaintiff argued that if the one month had expired the right to appeal had also lapsed and as such if there was no right to appeal then there was no leave to apply in the High Court. Plaintiff also submitted that there can be no such position as unlimited time to apply for leave to appeal under s. 68(2) CJA in the High Court because even for the Supreme Court r. 60 of RSC imposes a time limit and as such for the High Court the time limit was under r. 56 which was the time limit to bring an appeal to the Supreme Court.

Defendants however contended that time limit should not be considered by the Court. This was because 68(2) CJA did not provide for any time limit and even if the time to appeal had expired it was a separate issue to be dealt with in the Supreme Court under r. 56 RSC. It was also the contention of the defendants that the Court should grant the leave first and thereafter it was for the defendants to seek for extension of time to appeal before the proper forum. Defendants also submitted that the guiding principle for this Court in considering the application for leave to appeal should be to consider the issues that were likely to be presented to the Supreme Court on appeal and that there was no prejudice on the plaintiff on account of the application for leave to appeal.

Held:

[1] It was obvious from the account of both sides that the question of expiry of time to appeal in relation to an application for leave to appeal was never brought up to the attention of the Supreme Court during the hearing and the issue had to be considered by this Court.

[2] An application for leave to appeal under s. 68(2) CJA in the High Court was not without time limit.

[3] Although s. 68(2) CJA appeared to be silent on the time limit in respect of an application for leave to appeal either in the Supreme Court or the High Court, it was apparent in r. 60 that a time limit was provided when an application for leave to appeal was made in the Supreme Court. As such for the High Court the time limit was the appeal period of one month.

[4] A dissatisfied party must obtain the necessary leave and must then file and serve his notice of appeal within the one month period from the date when judgment was pronounced or within such extended period as the Supreme Court may allow.

[5] Delay in filing the necessary motion is invariably fatal and in such case mistakes of the appellant's solicitors on point of law by itself cannot constitute sufficient ground for granting the application. Indeed in the present case there was a delay of 8 months to file the necessary motion.

[6] Therefore the application for leave to appeal by the defendants was incompetent since the time for appealing has expired.

[Application dismissed with costs.]

Cases referred to:
Mae Bina Sdn. Bhd. v. Chee Kie Chong [1991] 1 CLJ (Rep) 278 ***(foll)***
Tractors Malaysia Bhd. v. Southern Estates Sdn. Bhd. & Anor. [1984] 1 CLJ (Rep) 398 ***(refd)***
Hamzah bin Abdul Majid & Anor v. Sungai Way Leasing Sdn. Bhd. [1986] CLJ (Rep) 152 ***(refd)***
Pang Hon Chin v. Nahar Singh [1986] 2 MLJ 145 ***(foll)***
Sinnathamby & Anor v. Lee Chooi Ying; Brijkishore & Anor. v. Lee Chooi Ying [1987] CLJ (Rep) 336 ***(cit)***

Legislation referred to:
Courts of Judicature Act 1964, s. 68(1)(a), (2)
Rules of the High Court 1980, O. 18 r. 19
Rules of the Supreme Court 1980, rr. 56(a), 60

For the applicant/defendants - George Lo (Fabian Lim with him); M/s. Chua Khaider Lim & Co.
For the respondent/plaintiff - M/s. Sandhu; M/s. Sandhu

JUDGMENT

Richard Malanjum JC:

By way of a summons in chambers dated 24 December 1991 the defendants applied for leave to appeal to the Supreme Court pursuant to s. 68(2) of the Courts of Judicature Act 1964 ("the Act") in respect of the judgment delivered by Tan Chiaw Thong J on 20 October 1990. In that judgment his Lordship found for the plaintiff upon the application of the plaintiff under O. 18 r. 19 of the Rules of the High Court 1980 to strike out paras. 2.2, 2.5 and 4(1) of the defence of the defendants and thereafter for judgment to be entered for the plaintiff. As the matter comes within the ambit of s. 68(2) of the Act, the defendants, being the dissatisfied party, have to fulfil the prerequisites imposed by the said subsection. The plaintiff meanwhile has also filed an application dated 3 July 1992 to set aside the said defendants' application for leave to appeal.

Both applications have been fixed for hearing on 17 August 1992 before me. On the suggestion of the learned Counsel for the defendants, Mr. George Lo, that the application of the defendants for leave to appeal should be heard first and to which Mr. Sandhu, learned Counsel for the plaintiff agreed, I proceeded therefore to hear the application. Mr. Sandhu nevertheless expressed his intention to strongly oppose it.

Before proceeding further, I am of the view that it may be appropriate to outline briefly the relevant events leading to this present application of the defendants. They are as follows:

(i) 20 October 1990 judgment was delivered in favour of the plaintiff;

(ii) 10 November 1990 defendants filed a notice of appeal to the Supreme Court without due compliance with s. 68(2) of the Act;

(iii) 11 July 1991 defendants filed a notice of motion to the Supreme Court for leave to appeal and extension of time to file the memorandum and record of appeal;

(iv) 9 November 1991 plaintiff filed a notice of motion to the Supreme Court applying *inter alia*, for an order that the appeal of the defendants be struck out;

(v) 9 December 1991 hearing came up before the Supreme Court for the defendants' application under item (iii) above as well as for the plaintiff's application under item (iv) above. I shall deal with the outcome of the hearing according to the versions of the respective parties later but one point was agreed by the parties and that is, during the hearing the defendants withdrew their application with liberty to file an application for leave to appeal in the High Court. Hence, this is the present application before me. The plaintiff's application was adjourned and according to Mr. Sandhu it is now fixed for hearing on 21 August 1992 before the Supreme Court.

In opposing the application for leave to appeal by the defendants, learned Counsel for the plaintiff submitted three points of objection with the last two being made in the alternative to the first. It was the contention of the plaintiff that the application of the defendants for leave to appeal should be dismissed in *limine* as the application would be incompetent since the time for appealing had expired. Mr. Sandhu submitted that under r. 56 of the Rules of the Supreme Court 1980 ("the Rules") the time limit to appeal to the Supreme Court is one month.

Thus, he argued, if the one month had expired the right to appeal had also lapsed. As such, he further submitted, if there is no right to appeal there is no leave to apply in the High Court. It was also submitted that there can be no such position as unlimited time to apply for leave to appeal under s. 68(2) of the Act in the High Court. His reasoning was that even for the Supreme Court r. 60 of the Rules imposes a time limit and as such for the High Court the time limit is under r. 56 of the Rules which is the time limit to bring an appeal to the Supreme Court.

Several authorities were cited which I shall consider later.

The alternative points of objection of the plaintiff were:

(a) that there was inordinate delay of 8 months to file the first application for leave to appeal. No satisfactory or acceptable explanation was given except their solicitors failure to comply with the procedural requirement. To this Mr. Sandhu submitted that it was not a valid explanation for the delay; and

(b) the length of delay and the likelihood of prejudice on the plaintiff should also be taken into account in considering the application of the defendants. Merits on the defendants' intended appeal need not be considered.

As for the defendants it was their contention in making the application as well as in reply to the objections of the plaintiff that time limit should not be considered by this Court. This is because s. 68(2) of the Act does not provide for any time limit and even if the time to appeal has expired it is a separate issue to be dealt with in the Supreme Court under r. 56 of the Rules. Mr. Lo submitted that to read subsection 68(2) of the Act in the way as submitted by learned Counsel for the plaintiff would amount to making the said subsection subject to r. 56 which should not be the case.

It was also the contention of the defendants that this Court should grant the leave first and thereafter it is for the defendants to seek for extension of time to appeal before the proper forum.

It was also submitted that the guiding principle for this Court in considering the application for leave to appeal should be to consider the issues that are likely to be presented to the Supreme Court on appeal and that there is no prejudice on the plaintiff on account of the application for leave to appeal.

Before going into the issues raised in the submissions I wish to deal with the versions of the parties as to what took place before the Supreme Court on 9 December 1991.

According to Mr. Sandhu this was what happened. The defendants filed a notice of motion praying for 3 main orders:

(i) leave to appeal under s. 68(2) of the Act;

(ii) extension of time to file the memorandum of appeal; and

(iii) extension of time to file the record of appeal.

There was no application before the Supreme Court for extension of time to appeal under r. 56(a) of the Rules and there was no application for extension of time to apply for leave to appeal under r. 60 of the Rules. According to Mr. Sandhu at that time the Supreme Court took the stand that an application for leave should be made first in the High Court. The motion of the defendants was therefore withdrawn with liberty to apply in the High Court. The question of expiry of time to appeal and an application for leave to appeal was never raised in the notice of motion and such question was therefore not before the Supreme Court. At the same time however, there was already an application by the plaintiff before the Supreme Court to set aside the defendants' notice of motion and also to strike out the appeal. But the hearing of that application though fixed on the same day, was adjourned and so said Mr. Sandhu he did not have the opportunity to submit on the point.

Mr. Lo did not dispute the version put forward by Mr. Sandhu except that part regarding the reason for the adjournment of the plaintiff's application on that day.

Mr. Lo said that the plaintiff's application was adjourned because by the time it came up for hearing the Court had already granted the defendants liberty to apply for leave in the High Court. According to him the Supreme Court indicated that since it had already given the defendants liberty to apply for leave in the High Court the hearing of the plaintiff's application should be adjourned.

Be that as it may, it is obvious from the account of both sides that the question of expiry of time to appeal in relation to an application for leave to appeal was never brought up to the attention of the Supreme Court during the hearing. As the issue is now before me it is for this Court to consider.

Having considered the submissions of the learned Counsel of the parties together with the relevant affidavits filed herein and having read the authorities submitted I am of the view that an application for leave to appeal under s. 68(2) of the Act in the High Court is not without time limit as suggested by the learned Counsel for the defendants.

Section 68(2) of the Act provides:

> No appeal shall lie from an order made by a Judge of the High Court in Chambers unless the Judge has certified, after application, within four days after the making of the order by any party for further argument in Court, that he requires no further argument, or unless leave is obtained from the Supreme Court or from a Judge of the High Court.

The gist of this subsection is that there is no right of appeal unless one of the prerequisites stated therein has been complied with. But the question remains whether there is a time limit to comply with such prerequisites. This question may be answered by looking at the provisions of r. 56 and r. 60 of the Rules and the recent judicial pronouncements on this issue.

Rule 56 of the Rules provides:

> No appeal shall, except by leave of the full Court, be brought after the expiration of one month:
>
> (a) in the case of an appeal from an order in Chambers, from the date when such order was pronounced at the hearing or after the hearing in open Court or after the issue of the certificate by the Judge that he requires no further argument, whichever is the later or when the appellant first had notice thereof;
>
> (b) in the case of an appeal against the refusal of an application, from the date of such refusal;
>
> (c) in all other cases, from the date on which the judgment or order appealed against was pronounced.

Rule 60 provides:

> Where leave of the Supreme Court to appeal is required, the application for such leave, may be made *ex-parte* to the Court, **before expiration of the time limited for bringing the appeal or within such enlarged time as the Court may allow:** provided that the Court may direct service on any other party.

(Emphasis added)

Though subsection 68(2) appears to be silent on the time limit in respect of an application for leave to appeal either in the Supreme Court or the High Court, it is apparent in r. 60 that a time limit is provided when an application for leave to appeal is made in the Supreme Court. As such for the High Court I am of the view that the time limit is the appeal period of one month. I find support for this view in the words of his Lordship Mohamed Azmi SCJ in *Mae Bina Sdn. Bhd. v. Chee Kie Chong* [1991] 1 CLJ (Rep) 278 at p. 282:

> On the particular facts of the present case, the appellant had complied with none of the prerequisites imposed by s. 68(2). There was a chain of errors in the prosecution of this appeal. **The only way this appeal could have been maintained was for the appellant to apply for leave to appeal in lieu of the certificate, within one month of the date of**

> **order made in chambers,** irrespective of the value or nature of the respondent's claim. On 2 October 1988, instead of applying for further argument out of time, the appellant was then still within time to apply for leave to appeal from the High Court under s. 68(2).
>
> (Emphasis added)

Similar expression of opinion was in fact made in the case of *Tractors Malaysia Bhd. v. Southern Estates Sdn. Bhd. & Anor.* [1984] 1 CLJ (Rep) 398 at p. 401 by his Lordship Mohamed Azmi as well when he stated thus:

> The words "whichever is the later" in r. 56(a) seem to suggest that the safest procedure for an appellant would be to comply with the four-day rule and apply for a certificate **unless the appellant can rush through within one month from the date when such order was pronounced not only the process of obtaining leave but also the filing of the notice of appeal.**
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> (Emphasis added)

In the case of *Hamzah bin Abdul Majid & Anor. v. Sungei Way Leasing Sdn. Bhd.* [1986] CLJ (Rep) 152 at p. 154, his Lordship Syed Agil SCJ provided the way out for the appellants in that case to apply for leave to appeal when he said:

> ... the appellants have not formally exhausted their remedies to apply for leave to appeal under the second limb of s. 68(2) of the Act. Since the period of one month to appeal has lapsed, the application should now be made to the Supreme Court in compliance with r. 56 RSC 1980.

I also find no good reason to differ from the views expressed by his Lordship Edgar Joseph Jr. J (as he then was) in the case of *Pang Hon Chin v. Nahar Singh* [1986] 2 MLJ 145. In that case the learned Judge was of the view that a dissatisfied party must obtain the necessary leave and must then file and serve his notice of appeal within the one month period from the date when judgment was pronounced or within such extended period as the Supreme Court (then Federal Court) may allow. His Lordship was also of the view that since the time for appealing had expired in that case the application for leave would be incompetent. Although in that case the Court was dealing with leave under s. 68(1)(a) of the Act, in my view the same principle should apply to an application for leave under s. 68(2). They are the same type of leave. (See: *Sinnathamby & Anor. v. Lee Chooi Ying; Brijkishore & Anor. v. Lee Chooi Ying* [1987] CLJ (Rep) 336)

In the present case it is not disputed that the time for appealing has expired. But it was the contention of the learned Counsel for the defendants that time should not be a factor to consider in deciding whether or not to grant the leave to appeal. The case of *Sinnathamby* (*supra*) was relied to support the argument that leave can be granted by this Court even after the appeal period has expired. In that case it appears that the judgment of the Court was given on 23 September 1985 yet the leave was only granted on 1 November 1985. But learned Counsel omitted to say that the application for leave to appeal was made on 24 October 1985 and within the one month appeal period. Further, the granting of the leave was not made an issue. As such I do not think *Sinnathamby's* case helps the defendants on the question of time limit for application for leave to appeal. On the contrary, the said case held that generally delay in filing the necessary motion is invariably fatal and in such cases mistake of the appellant's solicitors on point of law by itself cannot constitute sufficient ground for granting the application. Indeed in the present case there was a delay of 8 months to file the necessary motion.

For the above reason I rule therefore that the application for leave to appeal by the defendants is incompetent since the time for appealing has expired.

Lastly, in view of the conclusion that I have made I do not think it is necessary for me to consider the alternative grounds of objection submitted by the learned Counsel for the plaintiff. As for the other points submitted by the learned Counsel for the defendants suffice it to say that having considered the issues as submitted that would likely have been brought up in the event of an appeal I would have been inclined to grant the leave. But for the reason which I have stated earlier on the application is hereby dismissed with costs.

Also found at [1992] 4 CLJ 2154